Malayan Banking Bhd & Ors v Tho Siew Wah & Anor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS B-01(NCVC)(W)-56–02 OF 2015 AND B-01(NCVC)(W)-82–03 OF 2015
ALIZATUL KHAIR, ABANG ISKANDAR AND NALLINI PATHMANATHAN JJCA
24 JANUARY 2017

Land Law — Transfer — Fraud — Forged memorandum of transfer used to transfer land ownership — Whether registration of transfer bad in law and had to be cancelled — Whether non-payment of full purchase price (contrary to what was stated in memorandum of transfer) showed illegal conduct of 'buyers' of the land and denied them of getting any relief whatsoever from the courts — Ex turpi causa non oritur actio — Whether charge over land invalid as chargee not bona fide purchaser for value — Whether failure of chargee's lawyer to verify particulars in transfer and charge documents equal to chargee's own failure and disqualified it from being bona fide purchaser for value — Whether chargee could claim indemnity/contribution from Registrar of Land Titles for latter's negligence in facilitating fraudulent transfer of land — National Land Code s 340

The first respondent, Tho Siew Wah ('R1'), who owned a piece of land and had possession of the original title deed to the land at all material times, discovered from a land search that, without her knowledge, ownership of her land had been transferred to Cheah Tai Seng and Mohd Zawawi bin Abdullah ('Cheah' and 'Mohd Zawawi') using a new title to her land. The new title had been issued by the Registrar of Titles, Selangor ('the registrar') who had cancelled her old title. The registrar never informed R1 about the issuance of the new title, nor was she ever told to surrender her old title and take possession of the new one. The registrar was also unable to identify the person who had collected the new title from the registrar's office. Using her personal particulars, someone had forged R1's signature on the memorandum of transfer (Form 14A) to 'sell' the land to Cheah and Mohd Zawawi for RM4.5m. Cheah and Mohd Zawawi, who had never met R1, never personally paid any part of the RM4.5m but they borrowed RM2.25m from Malayan Banking Bhd ('MBB') to purportedly finance the purchase and created a charge over the land in MBB's favour. It was later discovered that stamp duty on the transfer had also not been paid. R1 sued Cheah, Mohd Zawawi, MBB and the registrar in the High Court seeking orders that the transfer and charge were null and void and should be set aside and that ownership of the land should be returned to her free of encumbrance. R1 also sought damages against the registrar for his negligence in the whole affair. Cheah, Mohd Zawawi and MBB gave notice that they would claim for

indemnity/contribution against the registrar if the transfer and charge were set aside and they were held liable for damages. The High Court allowed part of R1's claims but dismissed her claims for damages against Cheah, Mohd Zawawi and the registrar. All claims for indemnity/contribution against the registrar were also dismissed. R1 did not appeal the verdict. The instant appeals were only against the dismissal of the indemnity/contribution claims and the allowing, in part, of R1's claims. At the outset of the hearing of the instant appeals, the registrar raised a preliminary objection that as the suit had not named the actual tortfeasor of the alleged negligent act in the registrar's office, the government could not be held vicariously responsible under ss 5 and 6 of the Government Proceedings Act 1956. In reply, the opposing parties said the cause of action in the instant case was not against the government and, therefore, the question of naming the actual tortfeasor did not arise. With regard to their respective appeals, Cheah, Mohd Zawawi and MBB contended that they were bona fide purchasers for value who were not involved in the forgery of R1's signature or the issue of the non-payment of the stamp duty on the transfer; that they had consequently acquired an indefeasible title/interest in the land. The High Court held that as Cheah and Mohd Zawawi were immediate purchasers, their bona fides was irrelevant and their title could be set aside if the transfer of the land into their names was obtained through forgery or the use of a void and insufficient instrument, whether or not they were privy to the vitiating acts mentioned in s 340(2) of the National Land Code ('the NLC'). As for MBB, the court held that although it was a subsequent purchaser, the facts showed it was not a bona fide purchaser for value and, hence, its charge over the land was void. The court also held that Cheah, Mohd Zawawi and MBB could not succeed in their claims for indemnity/contribution against the registrar because they were not bona fide purchasers for value.

Held:

(1) There was no merit in the registrar's preliminary objection. The provisions of the Government Proceedings Act 1956 did not apply in this case because s 12 of the NLC made specific provisions as to the correct party to be sued. Pursuant to s 12, it was sufficient and proper for the purpose of making a claim for damages and/or indemnity and contribution to name the 'Pendaftar Hakmilik Negeri Selangor' as the defendant. The Registrar of Titles was responsible for the acts of the officers under his immediate control in the matter of managing the registration of land titles under his purview at the land office registry in Gombak Land District, Selangor (see paras 27–28 & 34–35).

(2) This court agreed with the trial judge that as the forged Form 14A was a void instrument, the registration of Cheah's and Mohd Zawawi's names on the title to the land was bad in law. The title that Cheah and Mohd Zawawi acquired was defeasible on account of s 340(2) of the NLC. It did

not matter that they were not privy to the forgery because they were the immediate purchasers and therefore, were not protected under the proviso to s 340(3). As for their claims for indemnity/contribution, the evidence showed they had been involved in acts that bordered on illegality. The maxim *ex turpi causa non oritur actio* applied to deny Cheah and Mohd Zawawi of any remedy from the courts. They were directly involved in the signing of the Form 14A that stated that the purchase price for the land had been fully paid when in fact that had not been done. That clearly exposed their illegal conduct, which disqualified them from obtaining any relief in the form of a contribution or indemnity from the Registrar of Titles, Selangor (see paras 40 & 48–50).

(3) Although MBB was a subsequent purchaser as the chargee, it was not a bona fide purchaser for value without notice. The evidence showed MBB had left it entirely to its lawyers to do the preparation of the transfer and charge documents. It was MBB's lawyer's duty to have checked and verified the accuracy of the particulars contained in those documents including the matter of the ad valorem stamp duty on the transfer which had not been paid at all. Lapses on the part of MBB's lawyer taken as a whole represented a breach of the duty of care she owed her client. The lawyer was MBB's agent and what she did or omitted to do would bind MBB. The lawyer's failure was MBB's failure. On that premise, MBB was not a bona fide purchaser for value and the charge it had over the land was void and of no effect and had to be cancelled. The title to the land had to be returned to R1 free of MBB's charge (see paras 67–68, 72 & 74–76).

(4) Although MBB was not a bona fide purchaser for value, it did not follow *ipso facto* that it was precluded from making an indemnity/contribution claim against the Registrar of Titles on the basis of negligence. MBB's lawyer's negligence was insufficient to amount to illegal, unlawful or wrongful conduct falling within the maxim of *ex turpi causa non oritur actio*. The evidence showed the Registrar of Titles was negligent in that: (a) it made no attempt to notify R1 of the replacement of the old title with the new title, which the registrar was statutorily required to do; (b) it was unable to confirm the identity of the person who had collected the new title; and (c) the Deputy Registrar of Title in his evidence conceded that the procedure adopted and the lack of records was negligent. There was total failure on the part of the Registrar of Titles, Selangor, to comply with the procedure and regulation relating to the cancellation of the old title and the issuance of the new title as required under s 90 of the NLC. The trial judge made no finding on this issue. MBB's appeal in respect of its claim for indemnity and/or contribution against the Registrar of Titles, Selangor, was therefore allowed and this part of the claim was ordered to be remitted back to the High Court for assessment of damages under this head (see paras 78–80).

[Bahasa Malaysia summary

Responden pertama, Tho Siew Wah ('R1'), yang memiliki sebidang tanah dan mempunyai milikan surat ikatan asal hakmilik tanah pada setiap masa material, mendapati melalui carian tanah bahawa, tanpa pengetahuannya, milikan tanahnya telah dipindah milik kepada Cheah Tai Seng dan Mohd Zawawi bin Abdullah ('Cheah' dan 'Mohd Zawawi') menggunakan hakmilik baharu tanahnya. Hakmilik baharu tanah dikeluarkan oleh Pendaftar Hakmilik Selangor ('pendaftar') yang telah membatalkan hakmilik lama. Pendaftar tidak memaklumkan R1 tentang pengeluaran hakmilik baharu dan R1 juga tidak diminta menyerahkan hakmilik lama dan mengambil hakmilik baharu dari Pejabat Pendaftar. Menggunakan butiran peribadi R1, seseorang telah memalsukan tanda tangannya pada memorandum pindah milik (Borang 14A) untuk menjual tanah tersebut kepada Cheah dan Mohd Zawawi bagi jumlah RM4.5 juta. Cheah dan Mohd Zawawi, yang tidak pernah bertemu dengan R1, tidak pernah membayar apa-apa jumlah RM4.5 juta tetapi mereka meminjam RM2.25 juta daripada Malayan Banking Bhd ('MBB') kononnya untuk membiaya belian dan membentuk satu pajakan tanah bagi MBB. Kemudian, didapati bahawa duti setem pada pindah milik juga tidak dibayar. R1 memulakan tindakan di Mahkamah Tinggi terhadap Cheah, Mohd Zawawi, MBB dan pendaftar, memohon perintah agar pindah milik dan pajakan diisytiharkan sebagai tidak sah dan terbatal serta wajar diketepikan dan agar milikan tanah dikembalikan dan agar milikan tanah dikembalikan bebas daripada kekangan. R1 juga memohon ganti rugi terhadap pendaftar atas kecuaiannya dalam hal ini. Cheah, Mohd Zawawi dan MBB memberi notis bahawa mereka akan menuntut indemniti/sumbangan terhadap pendaftar jika pindah milik dan pajakan diketepikan dah jika perlu membayar ganti rugi. Mahkamah Tinggi membenarkan sebahagian tuntutan R1 tetapi menolak tuntutannya bagi ganti rugi terhadap Cheah, Mohd Zawawi dan pendaftar. Kesemua tuntutan bagi indemniti/sumbangan terhadap pendaftar juga ditolak. R1 tidak merayu terhadap keputusan. Rayuan-rayuan ini adalah terhadap tuntutan penolakan indemniti/sumbangan dan pembenaran sebahagian tuntutan R1. DI awal perbicaraan rayuan-rayuan, Pendaftar membangkitkan bantahan awalan bahawa oleh kerana guaman ini tidak menamakan pelaku tort bagi tindakan yang didakwa cuai di pejabat pendaftar, kerajaan tidak boleh dikatan bertanggungan secara vikarius bawah ss 5 dan 6 Akta Prosiding Kerajaan 1956. Dalam responsnya, pihak yang menentang mendakwa kausa tindakan dalam kes ini bukan terhadap kerajaan dan, oleh itu, persoalan tentang menamakan pelaku tort sebenar tidak timbul. Bagi rayuan-rayuan masing-masing, Cheah, Mohd Zawawi dan MBB menyatakan bahawa mereka pembeli bona fide bagi nilai yang tidak terlibat dengan pemalsuan tanda tangan R1 atau isu kegagalan membayar setem duti pindah milik; bahawa mereka dengan itu memperoleh hakmilik/kepentingan tidak boleh sangkal tanah, bona fide mereka tidak relevan dan bahawa hakmilik mereka boleh diketepikan jika tanah yang dipindah milik kepada

mereka diperoleh melalui penipuan atau penggunaan instrumen tipu atau tidak cukup, sama ada atau tidak mereka privi kepada tindakan-tindakan yang melupuskan kesahan seperti yang dinyatakan dalam s 340(2) Kanun Tanah Negara ('KTN'). Bagi MBB, mahkamah memutuskan bahawa walaupun MBB adalah pembeli terkemudian, fakta menunjukkan MBB bukan pembeli bona fide bagi nilai dan dengan itu, pajakannya atas tanah tidak sah. Mahkamah juga memutuskan bahawa Cheah, Mohd Zawawi dan MBB tidak boleh berjaya dalam tuntutan mereka bagi indemniti/sumbangan terhadap pendaftar kerana mereka bukan pembeli bona fide bagi nilai.

Diputuskan:

(1) Tiada merit dalam bantahan awal pendaftar. Peruntukan Akta Prosiding Guaman tidak terpakai dalam kes ini kerana s 12 KTN membuat peruntukan khusus bagi pihak yang sebetulnya harus disaman. Susulan s 12, cukup dan teratur bagi tujuan membuat tuntutan ganti rugi dan/atau indemniti dan sumbangan untuk menamakan 'Pendaftar Hak Milik Selangor' sebagai defendan. Pendaftar hakmilik bertanggungjawab bagi tindakan pegawai bawahannya dalam perkara menguruskan pendaftaran hakmilik bawah bidang kuasawanya di Pejabat Pendaftar Tanah di Pejabat Tanah Daerah Gombak, Selangor (lihat perenggan 27–28 & 34–35).

(2) Mahkamah bersetuju dengan hakim bicara bahawa oleh kerana Borang 14A adalah instrumen terbatal, pendaftaran nama Cheah dan Mohd Zawawi pada hakmilik tanah tidak sah. Hakmilik yang Cheah dan Mohd Zawawi perolehi boleh disangkal bawah s 340(2) KTN. Tidak penting sama ada mereka privi terhadap penipuan kerana mereka adalah pembeli langsung dan dengan itu, tidak dilindungi bawah proviso s 340(3). Bagi tuntutan indemniti/sumbangan, keterangan menunjukkan bahawa mereka terlibat dalam tindakan-tindakan yang hampir tidak sah. Maksim *ex turpi causa non oritur actio* terpakai untuk menafikan Cheah dan Zawawi apa-apa remedi daripada mahkamah. Mereka terlibat secara langsung dalam tanda tangan Borang 14A yang menyatakan bahawa harga belian tanah telah dibayar sedangkan hakikatnya, ini tidak dilakukan. Ini jelas sekali mendedahkan tindakan mereka yang tidak sah, yang melenyapkan kelayakan mereka daripada mendapat apa-apa relif dalam bentuk sumbangan atau indemniti daripada Pendaftar Hakmilik Selangor (lihat perenggan 40 & 48–50).

(3) Walaupun MBB adalah pembeli terkemudian, sebagai pemegang gadaian, MBB bukan pembeli bona fide bagi nilai tanpa notis. Keterangan menunjukkan bahawa MBB telah melepaskan kesemuanya kepada peguamnya untuk melakukan persiapan dokumen pindah milik dan pajakan. Peguam MBB berkewajipan memeriksa dan mengesahkan ketepatan butir-butir yang terkandung dalam dokumen-dokumen

tersebut termasuk perkara dalam duti setem ad valorem tentang pindah milik yang tidak dibayar langsung. Kesilapan oleh peguam MBB, dilihat secara keseluruhan, mewakili pelanggaran kewajipan berjaga-jaga pada anak guamnya. Peguam adalah ejen MBB dan apa yang dilakukannya atau tidak dilakukannya akan mengikat MBB. Kegagalan peguam adalah kegagalan MBB. Atas premis tersebut, MBB bukan pembeli bona fide bagi nilai dan pajakannya pada tanah tidak sah dan tidak berkuat kuasa dan perlu dibatalkan. Hakmilik tanah perlu dipulangkan kepada R1 bebas daripada pajakan MBB (lihat perenggan 67–68, 72 & 74–76).

(4) Walaupun MBB bukan pembeli bagi nilai, tidak bermaksud *ipso facto* MBB dikecualikan daripada tuntutan indemniti/sumbangan terhadap Pendaftar Hakmilik atas asas kecuaian. Kecuaian peguam MBB tidak cukup untuk terjumlah kepada pelakuan tidak saha atau salah bawah maksim *ex turpi causa non oritur actio*. Keterangan menunjukkan Pendaftar Hakmilik cuai apabila: (a) tidak membuat apa-apa percubaan untuk memaklumkan R1 tentang gantian hakmilik baharu dengan hakmilik lama yang perlu dilakukan oleh pendaftar bawah statutori; (b) tidak boleh mengesahkan identiti orang yang mengambil hakmilik baharu; dan (c) Timbalan Pendaftar Hakmilik, dalam keterangannya menyatakan bahawa prosedur yang terpakai dan ketiadaan rekod ada cuai. Berlaku kegagalan penuh Pendaftar Hakmilik Selangor untuk memenuhi prosedur dan peraturan berkaitan pembatalan hakmilik lama dan pengeluaran hakmilik baharu seperti yang dikehendaki bawah s 90 KTN. Hakim bicara tidak membuat apa-apa dapatan tentang isu ini. Rayuan MBB bagi tuntutan indemniti dan/atau sumbangan terhadap Pendaftar Hakmilik Selangor dibenarkan dan bahagian tuntutan ini diperintahkan dikembalikan semula ke Mahkamah Tinggi bagi taksiran ganti rugi bawah tajuk ini (lihat perenggan 78–80).]

Notes

For cases on fraud, see 8(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5821–5825.

Cases referred to

Au Meng Nam & Anor v Ung Yak Chew & Ors [2007] 5 MLJ 136; [2007] 4 CLJ 526, CA (folld)

Doshi v Yeoh Tiong Lay [1975] 1 MLJ 85, FC (refd)

Government of the State of Negeri Sembilan & Anor v Yap Chong Lan & 12 Ors; Lesco Development Corporation Sdn Bhd v Yap Chong Lan & 12 Ors [1984] 2 MLJ 123, FC (folld)

Government of the State of Sabah v Syarikat Raspand (suing as a firm) [2010] 5 MLJ 717; [2010] 7 CLJ 945, CA (refd)

Heveaplast Marketing Sdn Bhd v See Leong Chye @ Sze Leong Chye & 3 Others and other appeals [2016] MLJU 835; [2016] 1 LNS 393, CA (refd)

A *Holman v Johnson* (1775) 1 Cowp 341, KBD (refd)
Kerajaan Malaysia & Ors v Lay Kee Tee & Ors [2009] 1 MLJ 1; [2009] 1 CLJ 663, FC (refd)
Kumpulan Perubatan (Johor) Sdn Bhd v Dr Mohd Adnan bin Sulaiman & Anor [2015] MLJU 2109; [2015] 1 CLJ 471, CA (refd)
B *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719; [1995] 3 CLJ 520, CA (refd)
Ministry of Housing and Local Government v Sharp and another [1970] 2 QB 223, CA (refd)
Oliver v Hinton [1899] 2 Ch 264, CA (refd)
C *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1; [2010] 2 CLJ 269, FC (refd)

Legislation referred to

D Government Proceedings Act 1956 ss 5, 6
National Land Code ss 12, 12(1)(a), (4), 90, 340, 340(2), (2)(b), (3), Form 14A

Appeal from: Civil Suit No 22NCVC-635–05 of 2012 (High Court, Shah
E Alam)

Yoong Sin Min (Ng Hooi Huang and Chiok Li Wei with her) (Shook Lin & Bok) in Civil Appeal No B-01(NCVC)(W)-56–02 of 2015 for the first appellant.
Yoong Sin Min (Ng Hooi Huang and Chiok Li Wei with her) (Shook Lin & Bok)
F *in Civil Appeal No B-01(NCVC)(W)-82–03 of 2015 for the appellant.*
Ong Swee Leong (Yap Zhen Jun with him) (Armiy Rais) in Civil Appeal No B-01(NCVC)(W)-56–02 of 2015 for the second and third appellants.
Chin Yin Choi (Lee Soon Khean with him) (Kenny Lee & Co) in Civil Appeal No B-01(NCVC)(W)-56–02 of 2015 for the first respondent.
G *Ahmad Fuad bin Othman (Salwati bt Umar with him) (Selangor State Legal Advisor) in Civil Appeal No B-01(NCVC)(W)-56–02 of 2015 for the second respondent.*
Chin Yin Choi (Lee Soon Khean with him) (Kenny Lee & Co) in Civil Appeal No B-01(NCVC)(W)-82–03 of 2015 for the first respondent.
H *Ong Swee Leong (Yap Zhen Jun with him) (Armiy Rais) in Civil Appeal No B-01(NCVC)(W)-82–03 of 2015 for the second and third respondents.*
Ahmad Fuad bin Othman (Salwati bt Umar with him) (Selangor State Legal Advisor) in Civil Appeal No B-01(NCVC)(W)-82–03 of 2015 for the fourth respondent.
I

Abang Iskandar JCA (delivering judgment of the court):

BRIEF FACTS OF THE CASE

[1] Tho Siew Wah ('the plaintiff') was the initial registered proprietor of the land held under Geran Hakmilik No 100855, Lot No 8591, Mukim Dengkil, Daerah Sepang, Negeri Selangor ('the land'). She purchased the land on 23 August 2005 and had at all material times the physical possession of the original title deed ('old title deed') right from the time when she received the same from her lawyer after the land was registered in her name, as far back as 12 April 2006.

[2] The old title to the land was cancelled by the fourth defendant, Pendaftar Hakmilik Negeri Selangor, ('the Registrar of Titles, Selangor') as a result of a re-delineation of boundary exercise. On 14 June 2006, a new title over the land was issued. It was later collected by a person impersonating as the plaintiff, from the Registrar of Titles, Selangor's office. The Registrar of Titles, Selangor admitted that there was no notice given to the plaintiff of a new title having been issued and that there was no notice sent to the plaintiff requiring the old title to be surrendered by the plaintiff.

[3] Sometime around February 2012, it came to the plaintiff's attention that some people had come to view the land as if they were interested in purchasing the land. As the plaintiff never intended to sell the land, she became suspicious and proceeded to carry out a land search in the Registrar of Titles, Selangor's office on 23 February 2012.

[4] From the land search that was conducted, the plaintiff found out that the land had been transferred to one Cheah Tai Seng ('the first defendant') and Mohd Zawawi bin Abdullah ('the second defendant') on 28 July 2011 using the new title.

[5] The plaintiff also discovered that the land was sold by an individual using her full name and identification card number ('the fake seller') to the first and second defendants, purportedly for a consideration of RM4,500,000. The transfer form, Form 14A, dated 21 June 2011 was executed by the fake seller, on one side, and the first and second defendants on the other side. The plaintiff testified that she had never sold the land to anybody, including to the first and second defendants and that she had never parted with her old title deed ever since she obtained it after she had purchased the land.

[6] At the request of the first and second defendants, Malayan Banking Bhd ('the third defendant') had granted a term loan of RM2,250,000 to the first and second defendants to part-finance the purchase of the land. The security for the

said term loan was the first legal charge created by the first and second defendants over the land in favour of the third defendant.

[7] The plaintiff then initiated legal action as a result thereof. The plaintiff contended that, inter alia, the servants or agents of the Registrar of Titles, Selangor had been negligent in the process of issuing a new title as the plaintiff had never received any notification from the Registrar of Titles, Selangor concerning re-delineation of boundary or that a new title deed would be issued for the said property. The plaintiff also contended that the Registrar of Titles, Selangor owed a duty of care to the plaintiff and had been negligent in dealing with the title deed concerning the land and such negligence had facilitated the fraudulent transfer of the land into the first and second defendants' names.

THE PLAINTIFF'S CLAIMS AGAINST THE DEFENDANTS

[8] The plaintiff had sued four parties in her legal suit in respect of the land. In the Shah Alam High Court, the plaintiff had claimed, among others, for a declaration that the transfer of the land to the first and second defendants was null and void, and for an order for the Registrar of Titles, Selangor to cancel the entries or memorial in the registry of land title which were made in favour of the first and second defendants. She had also prayed for damages against the Registrar of Titles, Selangor. The plaintiff had also prayed for a declaration that the charge over the land in favour of the third defendant was null and void.

[9] On the other hand, the first and second defendants vide notice claiming contribution or indemnity dated 9 October 2012 had claimed against the Registrar of Titles, Selangor to be fully indemnified for all losses suffered by the first and second defendants and damages which may be awarded against them, in the event the transfer of the land in favour of the first and second defendants was declared null and void. Earlier, the third defendant also applied for a similar contribution against the Registrar of Titles, Selangor vide notice claiming contribution or indemnity which was dated 9 August 2012.

DECISION OF THE HIGH COURT JUDGE

[10] The learned High Court judge had, on 23 January 2015 allowed the plaintiff's claims, except the claims for damages against the first, second and the Registrar of Titles, Selangor, and dismissed the first, second, and third defendants' claims for contribution against the Registrar of Titles, Selangor, thus accounting for these appeals before us filed by the first, second, and third defendants. There was no appeal filed by the plaintiff. Specifically, the High Court, inter alia, had ordered the following:

(a) the transfer of the land in favour of the first and second defendants (the immediate purchasers) be declared null and void and be cancelled;

(b) the original issue document of title to the land be delivered to the plaintiff (Tho Siew Wah);

(c) the charge over the land in favour of the third defendant (the bank) registered under presentation No 76131/2011 be declared null and void and be cancelled;

(d) the Registrar of Titles, Selangor to cancel or cause for the cancellation of the registration of the transfer of the land in favour of the first and second defendants and also the charge over the land in favour of the third defendant, and to reinstate the plaintiff as the registered proprietor of the land; and

(e) costs in the sum of RM70,000 to be paid by the appellants.

THE APPEALS

[11] Aggreived with such decision, the first and second defendants (the immediate purchasers) filed an appeal to the Court of Appeal vide Civil Appeal No B-01(NCVC)(W)-56–02 of 2015. The third defendant (the bank), had also filed an appeal vide Civil Appeal No B-01(NCVC)(W)-83–03 of 2015 against the adverse orders of the High Court.

[12] We had the opportunity to hear all parties and we reserved the decision for deliberation. Essentially, these appeals were appeals against the decision of learned High Court judge in allowing the plaintiff's claim against the first, second, and third defendant and the dismissal of the notices for contribution and/or indemnity filed by the first, second and third defendants against the Registrar of Titles, Selangor. This is our decision, and the grounds of our decision.

[13] In our grounds of judgment, parties are referred to as they were referred to in the High Court.

PRELIMINARY OBJECTION BY THE REGISTRAR OF TITLES, SELANGOR

[14] Before us, during submissions, learned federal counsel for the Registrar of Titles, Selangor raised a preliminary objection on the issue of non-compliance with the provisions of the Government Proceedings Act 1956 ('the GPA 1956') by the adverse parties. In the event that his submission on the GPA 1956 issue did not hold water, then it was submitted before us that the factual matrix in this case did not establish any negligence on the part of the Registrar of Titles, Selangor.

[15] Needless to say, all the adverse parties had objected to this preliminary objection raised by the Registrar of Titles, Selangor. They had all protested that this issue was never pleaded in the defence nor was it canvassed before the trial judge in the court below.

[16] Having considered the respective submissions, we were of the view that as this matter related to a point of law, we had proceeded to hear out the Registrar of Titles, Selangor and we had also allowed all the defendants to answer to the same in reply, respectively. We agreed with Encik Ahmad Fuad, the learned federal counsel, that on the authority of the case of *Kumpulan Perubatan (Johor) Sdn Bhd v Dr Mohd Adnan bin Sulaiman & Anor* [2015] MLJU 2109; [2015] 1 CLJ 471 this court ought to allow submissions be heard on a matter that was essentially a point of law, though it was never taken up earlier before the trial court. This court in *Kumpulan Perubatan (Johor) Sdn Bhd* case had cited the case of *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719; [1995] 3 CLJ 520 in support thereof, when it said:

> These grounds were essentially issues of law that did not require the adduction of additional evidence beyond what had already been received during trial. We therefore agreed with the appellant's argument that these were fundamental issues of law on admitted facts that were not in controversy. It was within this court's discretion to allow the submissions in the interest of justice, bearing in mind the facts and the circumstances of the case.

[17] The preliminary objection was premised on the contention that as the action against the Registrar of Titles, Selangor was essentially an action in tort (being founded in the tort of negligence) against the government, then the provisions of ss 5 and 6 of the GPA 1956 ought to apply accordingly. That being the case, the actual tortfeasor of the negligent act must be named. Only if liability is established against the tortfeasor, being the agent, will the government be vicariously liable:

> 5 Liability of the Government in tort
>
> Subject to this Act, *the Government shall be liable for any wrongful act done or any neglect or default committed by any public officer* in the same manner and to the same extent as that in which a principal, being a private person, is liable for *any wrongful act done, or any neglect or default committed by his agent*, and for the purposes of this section and without prejudice to the generality thereof, any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the Government.
>
> 6 Limits of liability of the Government
>
> (1) No proceedings shall lie against the Government by virtue of Section 5 in respect of any act, neglect or default of any public officer, unless proceedings for damages in respect of such act, neglect or default would have lain against such officer personally.

[18] In the Court of Appeal decision in *Government of the State of Sabah v Syarikat Raspand (suing as a firm)* [2010] 5 MLJ 717; [2010] 7 CLJ 945, Low Hop Bing JCA outlined the application of the said ss 5 and 6 of the GPA as follows:

> (36) Section 6 expressly prohibits the bringing of any proceedings against the government for damages under s 5 unless the action for such wrongful act, neglect or default would have lain against the officer personally. This is a substantive provision that goes to the jurisdiction of the court. Liability can only be attributed to the government where the officer's act, neglect or default is proved to have established the liability of the officer personally. In the absence of the officer's liability, (which can only arise and bind the officer(s) if and when the officer or officers are cited as defendants), no proceedings shall lie against the government. Where no such proceedings could lie against the government, the court is in no position to exercise any jurisdiction in relation thereto.

[19] So the question was postulated by the learned federal counsel as to whether the Registrar of Titles, Selangor as named, was the actual tortfeasor in this case? Or must the actual tortfeasor be named and be proven to be liable before vicarious liability can be attached to the government?

[20] Learned federal counsel also cited the Federal Court case of *Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 MLJ 1; [2009] 1 CLJ 663, where it was held by the apex court that the government itself does not commit a tort but that it becomes vicariously liable for acts or omissions committed by its servants in the course of discharging their duties on its behalf. As such, the failure to name the actual tortfeasor employee and just by naming the government in such an action, was therefore fatal to the claimant's case. The view of the apex court was expressed as follows:

> (16) Thus, I entirely agree with the views expressed by Abdul Aziz J (later FJ) in *Haji Abdul Rahman*. Contrary to the finding of the Court of Appeal, *Haji Abdul Rahman* was correctly decided and should be upheld. Therefore, on the proper construction of ss 5 and 6 of Act 359, in any claim in tort against the government, the officer of the government who was responsible for the alleged tortious act must be made a party and his liability be established before the government can be made liable vicariously as principal. It would be insufficient to merely identify the officer without joining the officer as a party because liability by evidence needs to be established. It is only upon a successful claim against the officer personally can a claim be laid against the government.
>
> (17) In the present case, all the eight causes of actions are actions in tort or tort-based premised on the act or omission of an individual. None of the governments sued is capable of committing the wrong pleaded. Since the governments' liability in tort can only be vicarious by virtue of ss 5 and 6 of Act 359, and as the officers who were responsible for the alleged wrongdoing were not joined as defendants to the action, it is therefore not possible in law to maintain a successful claim in tort against the governments as primary tortfeasors. That being so, the

appellants' application to strike out the respondents' actions is meritorious.

[21] Learned federal counsel went on to submit that the failure to name the actual tortfeasor must be a fatal omission. He submitted that it was a matter that went to the jurisdiction of the court. He had cited the case of *Syarikat Raspand* in support of such proposition where learned Justice Low Hop Bing JCA had ruled that the court had no jurisdiction, in the event that ss 5 and 6 of the GPA 1956 were not complied with. Learned Justice Low had said in the *Syarikat Raspand* case as follows:

> (40) Reverting to the instant appeal we note that the alleged tortfeasors viz the government servants or officers had not been stated as defendants. This omission on the part of the plaintiff has resulted in the failure to satisfy the requirements of ss 5 and 6. That being the position, no proceedings shall lie against the government ie, the defendant herein, and consequentially, the High Court could not exercise jurisdiction in relation thereto.

[22] Mindful of the authorities on this matter, we allowed the fourth respondent to proceed with his preliminary objection.

[23] Looking at the parties named in this instance appeal, it was argued by federal counsel that the actual tortfeasor was not named as such. As a result of that, it was his contention that this court lacked the necessary jurisdiction to hear this appeal against the Registrar of Titles, Selangor.

[24] Learned counsel for the first and second defendants (the immediate purchasers) and the third defendant (the bank) submitted that the argument that was advanced in the preliminary objection by the Registrar of Titles, Selangor was a flawed one, for the simple reason that the cause of action in this case was not proceeded against the government, be it the federal or state government. As such, the question of naming the actual tortfeasor does not arise.

[25] Having considered the submissions by all parties, with respect, we see nothing in those cases cited by the learned federal counsel which could assist his cause.

[26] Really, the answer to this issue lies in the provisions as contained in the National Land Code ('the NLC'). In particular s 12 of the NLC which provides, as follows:

> 12 State Director and other State Officers
>
> (1) The State Authority may appoint for the State —
>
> (a) a State Director of Lands and Mines, a Registrar of Titles and a Director of Survey and Mapping;

(b) so many Deputy Directors of Lands and Mines, Assistant Directors of Lands and Mines, Deputy Registrars of Titles, Deputy Directors of Survey and Mapping, District Land Administrators, Assistant District Land Administrators, Survey Officers, Settlement Officers and other officers as the State Authority may consider necessary for the purpose of this Act.

(2) The State Authority may define the districts, sub-districts and other areas in which any of the officers referred to in paragraph (b) of sub-section (1) may exercise the powers and perform the duties conferred or imposed upon them by or under this Act.

(3) The State Director shall —

(a) be responsible to the State Authority for the due administration within the State of the provisions of this Act;

(b) act in accordance with any direction given to him by the State Authority;

(c) have all the powers conferred upon the Registrar and a Land Administrator by or under this Act;

(d) subject to the direction of the State Authority, exercise general control and supervision over the Registrar, and over all officers (other than Deputy Directors of Survey Mapping and other Survey Officers) referred to in paragraph (b) of sub-section (1).

(4) The State Director, the Registrar and every Land Administrator shall each have a seal of office, and every instrument purporting to bear any such seal, and to have been signed by or on behalf of the officer in question shall, unless the contrary be proved, be deemed to have been sealed and signed by him or at his direction.

(5) Subject to the provisions of sub-section (3), in every district in which there may be one or more Assistant Land Administrators in addition to a Land Administrator, every Assistant Land Administrator shall exercise the powers and perform the duties conferred or imposed upon him by or under this Act in conformity with the directions of the Land Administrator.

[27] In view of the clear provision as contained thereunder, we are of the view that it would be sufficient, for the purpose of making a claim for damages and/or indemnity and contribution, to name the 'Pendaftar Hakmilik Negeri Selangor', as the defendant.

[28] Having considered the contentions of both parties, it is our view the provisions of the GPA do not apply in this case. This is because the NLC makes specific provisions as to the correct party to be sued in s 12 of the NLC. Looking at how the statement of claim is couched, this is an action against the officer appointed as the Registrar of Titles, an office and appointment made by

the state authority, as can be seen under s 12(1)(a) of the NLC. According to sub-s (4) to s 12 of the NLC, 'The State Director, *the Registrar* and every Land Administrator, shall each have a seal of office, and every instrument purporting to bear any such seal, and to have been signed by or on behalf of the officer in question shall, unless the contrary be proved, be deemed to have been sealed and signed by him or at his direction'. (Emphasis added.)

[29] What that means is that any act relating to any instrument that bears the seal or signature of the registrar or on behalf of the registrar, is deemed unless the contrary is proven, to be attributable to the registrar or done on his direction.

[30] In this case, the Registrar of Titles, Selangor was the Registrar of Titles where the subject land was situated and where the land officers issuing and registering the land titles were working at the material time. It was alleged by the first, second, and third defendants that the negligence of the Registrar of Titles, Selangor had caused them to suffer losses. The question that needed to be answered would necessarily be: 'who was to be held liable for such losses and who was to be sued, in the circumstances?'.

[31] We reiterate that s 12 answers that question more than adequately. We as supported in our view by Abdoolcader FCJ's judgment in *Government of the State of Negeri Sembilan & Anor v Yap Chong Lan & 12 Ors; Lesco Development Corporation Sdn Bhd v Yap Chong Lan & 12 Ors* [1984] 2 MLJ 123 ('*Yap Chong Lan* case') which reads as follows:

> At the inception of the hearing the state legal adviser who appeared for the state government and the Director of Lands and Mines took a preliminary objection to the joinder of the state government as a party to the proceedings in view of the provisions of s 16(2). The learned judge deferred his decision on this point until the conclusion of the trial and in his reserved judgment dismissed it on the grounds that 'because of the various declarations sought against it' the state government 'should be a proper and necessary party and ought to be heard, for the purpose of completely adjudicating on all the issues herein'. We must with respect say that this is a paralogism as it involves the fallacy of *petitio principii*; it begs the question as there can be no question of any relief being accorded against the state government if it is not a proper party. The state government as such has nothing to do with proceedings under the Code. It is the state authority that is the pertinent entity, and state authority is defined in s 5 to mean the Ruler or Governor of the State, as the case may be. Section 12(1) provides for the state authority to appoint a Director of Lands and Mines for the State and sub-s (3) of that section specifies his functions, powers, duties and responsibilities. Section 16 enacts provisions for actions by and against the state authority, and sub-s (2) thereof specifically stipulates that any action, suit or other proceeding relating to land in which it is sought to establish any liability on the part of the state authority shall be brought against the Director of Lands and Mines of the State in the name of his office. It is accordingly abundantly clear that the state government should never have been joined in the proceedings

and on the preliminary objection taken it should have been discharged as a party thereto. There appears to be a popular misconception on this aspect of the matter and on the role of the government of a state as such in relation to the Code with the resultant indiscriminate misjoinder of state governments as parties in proceedings thereunder, and we expect due heed to be taken of the point we make in this regard.

[32] Therefore, the Registrar of Titles, Selangor is the correct party to be sued. Another English case of relevance is that of *Ministry of Housing and Local Government v Sharp and another* [1970] 2 QB 223 ('*Sharp* case').

[33] In this regard, we would refer the judgment of Lord Denning in *Sharp* case where the learned judge had said:

> Who, then, is to bear the loss? The negligent clerk can, of course, be made to bear it, if he can be found and is worth the money — which is unlikely. Apart from the clerk himself, there is only one person in law who can be made responsible. It is the registrar. He must answer for the mistakes of the clerk and make compensation for the loss. He is a public officer and comes within the settled principle of English law that, when an official duty is laid on a public officer, by statute or by common law, then he is personally responsible for seeing that the duty is carried out. He may, and often does, get a clerk or minor official, to do the duty for him, but, if so, he is answerable for the transgression of the subordinate: see *Sanderson v Baker* [1972] 3 Wils 309, 317, where Blackstone J states the position of the sheriff. Sometimes it is an absolute duty, in which case he must see that it is performed absolutely: see the instances given by Holt CJ in *Lane v Cotton* [1701] 1 Ld Raym 646, 651. At other times, it is only a duty to use due diligence, in which case he must see that due diligence is used: see the celebrated judgment of Best CJ in *Henly v Lyme Corpn* [1828] 5 Bing 91, 107–109. But, in any event, if the duty is broken, and injury is done thereby to one of the public, then the public officer is answerable. The injured person can sue him in the civil courts for compensation ...

[34] Reverting to our case, the Registrar of Titles is responsible for the acts of the officers under its immediate control in the matter of managing the registration of land titles under its purview at the Land Office Registry in Gombak Land District, Selangor. That is clear from the provisions under s 12(4) of the NLC. In this case, the Registrar of Titles, Selangor did not notify the plaintiff of the re-delineation although it would directly affect her land. Neither did the Registrar of Titles, Selangor request the plaintiff to surrender her old land title that was in her possession. The surrender of the old land title would enable the Registrar of Titles, Selangor to have it duly destroyed before a new title deed to the land was issued. Again, once, the new title deed to the land was issued, the Registrar of Titles, Selangor would have to notify the plaintiff to collect the same from the land office. The witness for the Registrar of Titles, Selangor was not able to confirm from the records kept by their office whether the plaintiff was ever notified to collect the new title deed to her land. Neither did they know the identity of the person who had collected the new

title deed from the land office registry. It was however not disputed that the plaintiff never collected the new land title deed as she was in possession of the old title deed at all material times. It was no surprise then that the Registrar of Titles, Selangor admitted that someone had come to their office to collect the new title deed to the land and that the new title to the land was indeed released to that person. That the Registrar of Titles, Selangor was not able to confirm with certainty who had collected the new land tile deed was indeed very telling. That was the basis for the claim for contribution from the Registrar of Titles, Selangor.

[35] In the circumstances, we reiterate our conclusion that, it is sufficient and proper, that the Registrar of Titles, Selangor be named and cited as was done by the plaintiff in this case. As such, we find no merit in the preliminary point raised by the learned ALA and we therefore hold it as unsustainable. The preliminary point is therefore dismissed.

THE FIRST AND SECOND DEFENDANTS' APPEAL (B-01(NCVC)(W)-56–02 OF 2015)

Whether the first and second defendants acquired an indefeasible title?

[36] Learned counsel for the first and second defendants in his written submission contended that the first and second defendants are bona fide purchasers as they were not involved in the forgery of the plaintiff's signature and *ad volerem* stamp. As such, they had obtained good title for the land they had purchased from the fake 'Tho Siew Wah'. Learned counsel submitted that the first and second defendants had obtained an indefeasible title to the land.

[37] The learned trial judge did not agree with his submissions in the court below. The learned trial judge referred to the Federal Court case of *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1; [2010] 2 CLJ 269 which held that on immediate purchaser of a title obtained fraudulently or through a void or insufficient instrument does not acquire an indefeasible title (see s 340(2)(b) of the NLC). In the instance case, the first and second defendants are the immediate purchaser. As such their title is defeasible and is liable to be set aside by the original owner.

[38] Therefore, the issue of the first and second defendants being bona fide is irrelevant. As long as the registration pursuant to the immediate purchase of the land was obtained through forgery or the use of a void or insufficient instrument, no indefeasibility of title is conferred by law under the NLC, whether or not the purchasers were privy to the vitiating acts mentioned under s 340(2) of the NLC.

[39] The learned trial judge had said at para 14 in his grounds of judgment

as follows:

> 14. Malah mengikut keterangan plaintif (*SP5*) (*di ms 62 QA 27 nota keterangan*) salinan kad pengenalan atas nama Tho Siew Wah yang disertakan bersama Borang 14A bertarikh *21 Jun 2011* bukan milik beliau dan gambar perempuan yang tertera di kad pengenalan tersebut juga bukan gambar beliau. Kad pengenalan milik beliau dikemukakan dan ditandakan sebagai eksh *P33*. Justeru itu berdasarkan fakta ini serta memandangkan bahawa keterangan SP4 dan SP6 tidak disoal balas maka adalah satu fakta yang tidak dinafikan bahawa tandatangan Tho Siew Wah yang terdapat pada Borang 14A bertarikh *21 Jun 2011* adalah bukan tandatangan plaintif dan jelas telah dipalsukan.

[40] Based on that finding, the Form 14A was therefore a void instrument and as such, the learned trial judge concluded that the registration of the names on the Register of Titles in relation to the land belonging to the plaintiff was bad in law. With respect, we agree with the finding of the learned trial judge. We therefore dismiss the appeal of the first and second defendants against the plaintiff. We affirm the order of the learned High Court judge for their names to be cancelled from the land title of the plaintiff.

Whether the first and second defendants are entitled to claim contribution and/or indemnity from the Registrar of Titles, Selangor?

[41] Turning to the issue whether the first and second defendant can claim contribution and/or indemnity from the Registrar of Titles, Selangor, the claim can be found at p 81 *Jld 1 rekod rayuan (Bahagian A)* which reads as follows:

> *Tuntutan Defendan Pertama dan Defendan Kedua Terhadap Defendan Keempat*
>
> Defendant Pertama dan Defendan Kedua menuntut daripada Defendan Keempat yang berikut:
>
> (1) Bahawa kedua-dua Defendan Pertama dan Defendan Kedua ditanggung rugi sepenuhnya bagi semua kehilangan yang dialami oleh Defendan Pertama dan Defendan Kedua dan ganti rugi yang mungkin diawardkan oleh Mahkamah terhadap Defendan Pertama dan Defendan Kedua sekiranya hakmilik Hartanah tersebut di bawah No Hakmilik 100855, Lot No 8591 berpihak kepada Defendan Pertama dan Defendan Kedua diperintahkan batal dan tidak sah;
>
> (2) Semua kos yang mungkin diarahkan untuk dibayar oleh Defendan Pertama dan Defendan Kedua untuk prosiding ini;
>
> (3) Semua perbelanjaan (termasuk yuran guaman atas dasar peguamcara dan anakguam), pembayaran dan jumlah sedemikian seperti yang mungkin dibelanjakan/digunakan oleh Defendan Pertama dan Defendan Kedua dalam prosiding ini; dan
>
> (4) Relif-relif lain yang difikirkan suaimanfaat dan wajar oleh Mahkamah Yang Mulia ini.

[42] We noted that this matter on contribution/indemnity was summarily dismissed by the learned trial judge, as can be seen in para 32 of his grounds of judgment. We reproduce that paragraph:

> 32. Jelas daripada fakta dan kesimpulan mahkamah ini bahawa defendan pertama dan defendan kedua serta defendan ketiga *bukanlah pembeli yang membeli tanah tersebut dengan suci hati*. Oleh itu tiada asas untuk mahkamah ini membenarkan permohonan defendan pertama dan defendan kedua serta defendan ketiga untuk defendan keempat menyumbang atau menanggung rugi atas apa-apa kerugian yang dialami oleh mereka. (Emphasis added.)

[43] The learned High Court judge appeared to be of the view that as the first, second, and third defendants were *not* bona fide purchasers for value, there was therefore no proper basis for the court to allow their respective claims for contribution as per their notices for contribution/indemnity against the Registrar of Titles, Selangor. However, it is our view that the learned judge erred in conflating the proviso to s 340(3) of the NLC with the issue of whether the first and second defendants had acted dishonestly or illegally in procuring the title to the land in their names without having paid the full purchase price. The finding of the judge in relation to the third defendant will be dealt with later on in the judgment.

[44] It now falls to be considered whether the first and second defendants conduct leading to the registration of their names in the land register at the Gombak Land Office was proper or dishonest?

[45] Before we can conclude on the propriety of their conduct, we would have to look at the evidence led before the learned trial judge. The evidence of Tho Siew Wah (SP5) and her husband (SP1) was essentially a denial of any knowledge of any dealings that had been going on in relation to the land, until they did a land search after feeling suspicious that some unsolicited persons had been coming to view their land. The NRIC of Tho Siew Wah had been forged whereby the image on the NRIC did not belong to her. Evidence of the officer from the National Registration Department confirmed that Tho Siew Wah, the plaintiff, had never applied for a new IC and that the version which she had in her possession was the authoritative one at all material times. Their evidence also adverted to the fact that the plaintiff had never sold the land in question to anybody for any amount. Neither had she received any payment of RM4.5m being the purported price of the land. Lastly, both SP1 and SP5 had never met the first and second defendants, let alone sold the land to them. Neither did they appoint the legal firm of K Kulasekar, Achan and Assoc that had purportedly acted on their instructions.

[46] Now, what did the first and second defendants say in evidence? The second defendant, Mohamed Zawawi bin Abdullah did not attend any of the

court's proceedings pertaining to this case. As for Cheah Tai Seng, the first defendant, he admitted in court that he only applied for RM2.25m from Malayan Banking Bhd (the third defendant) to purportedly pay for the balance of the purchase price for the land. He did pay the monthly instalments for the loan for a good few months until the scam was discovered. He however, admitted that he did not pay for the balance of the other half of the purchase price for the land. Neither did he pay the deposit of RM450,000 being the 10% deposit to the plaintiff. Similarly, neither did the second defendant pay the above amounts that were outstanding in relation to the purchase price and the deposit.

[47] In these circumstances, how could they fill in the Form 14A that pertained to the transfer of the land title into their names, when in fact they did not pay the full amount of RM4.5m which was declared as having been received in the Form 14A? In such circumstances, that Form 14A was void.

[48] As such, the learned High Court judge was correct in deciding the way he did, in that, the title to the plaintiff's land that was registered in their respective names was defeasible on account of s 340(2) of the NLC. It does not matter whether that they were not privy to the forgery because they are immediate purchaser, therefore not protected under the proviso to s 340(3). As for their claim against the respondent contributory/ indemnity, their conduct had shown that their involvement was more than that. To our minds, the conduct of the first and second defendants, as could be gleaned from the evidence led in court, including that of the investigating officer and the lawyer acting for the third defendant, showed that they had been involved in acts that bordered on illegality. Such being the case, can they come to court for relief from the Registrar of Titles, Selangor for the contribution/ indemnity?

[49] With respect, the Latin maxim of *ex turpi causa non oritur actio* would apply to deny the first and second defendants of any remedy from the courts. That maxim means that one who knowingly engages in an illegal activity may not profit from it. Under the common law, that maxim first found judicial expression in the case of *Holman v Johnson* (1775) 1 Cowp 341 where Lord Mansfield had famously said that the court will not lend its hand to a man who founds his cause of action on immoral or illegal act.

[50] Applying the maxim *ex turpi causa* to the facts in the appeal involving the first and second defendants, they had been directly involved in the signing of the Form 14A (exh D79) that stated that the purchase price for the land had been fully paid when in fact they had not done so. That clearly exposed their *illegal conduct*, which would disqualify them from obtaining any relief in the form of a contribution or indemnity from the Registrar of Titles, Selangor. As such, their appeal must be dismissed with costs.

[51] In the result, their names must be deleted from the register of titles and the name of the plaintiff should be reinstated on the same land title. The maxim of *ex turpi causa* applies against the first and second defendants such that their claim for contribution or indemnity against the Registrar of Titles, Selangor cannot be sustained.

THE THIRD DEFENDANT'S (THE BANK) APPEAL (B-01(NCVC)(W)-82–03 OF 2015)

Was the third defendant as a subsequent purchaser, a bona fide purchaser for value without notice?

[52] The plaintiff claimed against the third defendant for the latter's charge over her land to be cancelled as it was void. She had succeeded in her claim against the third defendant as evidenced in the order of the High Court. The High Court had also dismissed the third defendant's notice for contribution or indemnity against the Registrar of Titles, Selangor.

[53] Learned counsel for the third defendant submitted before us that the title of the purchasers, namely the first and second defendants, to the land was not void as the issuance of the new title was a continuation of the old title due to a re-delineation of boundary exercise. The new title was still issued in the name of the plaintiff, and not that of a third party or a non-existent entity. We refer to this as the 'first contention of the third defendant'.

[54] Another issue raised by the third defendant was that since it is the *subsequent* holder of interest in the land, in law, its interest is indefeasible provided it could establish that it fell within the proviso to s 340(3) of the NLC. The third defendant contended that it was a bona fide purchaser for value when it became the chargee over the land for the loan it had extended to the first and second defendants to part-finance to purchase the land. This is the 'second contention of the third defendant'.

[55] As regards the first contention, with respect, such a contention completely misses the point. It would not matter whether the new title to the land was valid as being a continuation of a validly issued title to the plaintiff. What would, and does matter, is the manner in which the first and second defendants being the immediate purchasers of the land, had come by the title to the land, purportedly from the plaintiff. If the first and second defendants had obtained it under circumstances envisaged under s 340(2)(b) of the NLC, they could not obtain an indefeasible title over the land regardless of the legal status of the land title. The evidence in this case had established beyond dispute that forgery of the plaintiff's NRIC was involved in the immediate transaction between the fraudster and the first and second defendants. Subsequently, the third defendant came into the picture when it granted a bridging term loan to

the first and second defendants thereby creating a charge over the land in its favour. Clearly therefore, the third defendant was dealing with the first and second defendants as immediate purchasers, not with the plaintiff. It is also clear that the first and second defendants had no good title in the land in question. On that account, we see no merit in the first contention of the third defendant.

[56] As regards the second contention of the third defendant, the ultimate conclusion would depend on the facts surrounding the subsequent transaction on the land between the third defendant and the purchasers, namely between the first and second defendants.

[57] The governing legal principle relating to such a transaction between the third defendant and the first and second defendants as in this appeal is contained in the *proviso* to s 340(3) of the NLC ('the proviso'). The effect of the proviso has been the subject-matter of numerous court cases. The Federal Court decision in the case of *Tan Ying Hong* case has finally put to rest what that proviso actually states and entails. It also means that the proviso, as it is worded, operates within the parameters of the subsection where it resides and does not migrate to affect other areas of the same s 340 of the NLC. So, what the proviso means is that a subsequent purchaser of a piece of land gets indefeasible title over the land if he purchases that piece of land bona fide or in good faith for value, even if it is subsequently discovered that the title he had purchased was in fact void. If it involves an interest, as in a charge, then the principle applies *mutatis mutandis*. The proviso to s 340(3) of the NLC creates a unique regime that gives legislative protection to a subsequent purchaser provided he fulfils the requirements pertaining to the bona fides of his purchase of the otherwise void title. The surrounding circumstances of the third defendant's *subsequent* creation of the charge over the purchasers' land on account of the bridging term loan would have to be scrutinised before it can rely on the proviso to s 340(3) of the NLC and be accorded indefeasibility as to its charge.

[58] The learned trial judge in the High Court had ruled that the third defendant was not a bona fide holder of the interest, to wit, the charge, over the land. He had outlined his reasons for having ruled as such. His reasons as set out in his grounds of judgment are:

> 24. Berdasarkan fakta kes dihadapan mahkamah ini, adalah jelas bahawa kedua-dua *dokumen 14A dan 16A* telah didaftarkan pada masa yang sama iaitu pada 28 Julai 2011 @ 2.07 pm (*P36 ms 42 dan 52 Ikatan Dokumen C*). Selain daripada itu adalah juga fakta bahawa Borang 14A selain daripada tandatangan plainif dipalsukan, juga terbatal disebabkan oleh instrument yang tak sah. Oleh yang demikian, Borang 16A juga adalah terbatal disebabkan perkara yang sama dan boleh diketepikan.

29. ... Meneliti kepada fakta sepertimana juga dibangkitkan oleh peguam plaintif terdapat beberapa perkara yang meragukan berlaku akibat tindakan daripada pihak defendan ketiga.

30. Pihak plaintif membeli tanah tersebut pada tahun 2005 dan tanah tersebut telah dinilai oleh Lembaga Hasil Dalam Negeri dengan nilai RM6,916,000 (*ekshs P11 dan P12 ms 22 dan 23 Ikatan Dokumen C*). SD2 iaitu Mohd Affandi bin Abdullah selaku Pengurus di Unit Pemprosesan Pinjaman Berpusat, Malayan Banking Bhd memberi keterangan bahawa terdapat dua penilaian keatas tanah tersebut tetapi hanya penilaian daripada Puan Noriha binti Harun (SD4), yang dikemukakan. SD4 menilai tanah tersebut dengan nilai RM4,500,000 (*eksh D61 ms 22–32 Ikatan Dokumen D*). Adalah tidak masuk akal tanah yang dinilai pada 2005 dengan nilai RM6,916,000 turun nilainya pada 2011 dengan nilai RM4,500,000 padahal tanah tersebut terletak dikawasan prima. Tiada penjelasan juga diberikan kenapa satu lagi lapuran penilaian tidak dikemukakan ke mahkamah untuk pertimbangan. Tambahan pula pihak defendan iaitu SD1 memberi keterangan bahawa beliau tidak mempunyai salinan sepenuhnya geran keatas hakmilik tanah tersebut (*ms 183 nota keterangan dan eksh D55*). Oleh itu tidak mungkin beliau menyerahkan sesalinan lengkap geran tanah tersebut kepada defendan ketiga semasa memohon pinjaman tersebut.

31. Tambah meragukan adalah samada wujudnya firma guaman yang sebenarnya bertindak bagi pihak penjual. Che Noriati binti Jusoh (SD4) dari firma Messrs Abdul Malik & Lawrence Tan, adalah peguam bagi pihak defenden ketiga yang mengendalikan dokumentasi pinjaman bank yang dibuat oleh defendan pertama dan kedua. Berdasarkan keterangan beliau (*di OA8 di ms 228 nota keterangan*), firma beliau telah menulis surat (*ekshs D63 — ms 269–270 Ikatan Dokumen C*) kepada Messrs K Kulasekar, Achan & Associate iaitu peguam kepada penjual memaklumkan bahawa defendan ketiga bersetuju untuk memberikan kemudahan pinjaman kepada defendan pertama dan kedua sejumlah RM2,250,000 bagi tujuan pembelian tanah tersebut. Surat tersebut dialamatkan kepada 308, 3rd Floor, Menara Majestic, No 15 Jalan Othman, 46000 Petaling Jaya dengan cara faks dan penyerahan tangan. Tetapi semakan dengan Bar Council Malaysia mengesahkan bahawa alamat semasa Messrs K Kulasekar, Achan & Associates adalah di No 2, 3/59, Jalan Aman, 46000 Petaling Jaya. Oleh itu bagaimana surat tersebut dapat diserahkan dengan tangan oleh firma Messrs Abdul Malik & Lawrence Tan kerana alamat tersebut bukan alamat berdaftar firma Messrs K Kulasekar, Achan & Associate. Dua surat iaitu D64 (ms 43–44 Ikatan D) dan D65 (ms 45–46) yang dikatakan dari peguam penjual kepada peguam pembeli juga adalah meragukan kerana kedua-dua surat tersebut dari mata kasar nampak sama samada dari segi jenis *font*, *size* font serta chop '*faxed*' dan '*received*' walaupun dari dua firma peguam yang berlainan. Kedua-dua surat tersebut telah difakskan pada lebihkurang masa yang sama kepada firma Messrs Abdul Malik & Lawrence Tan tetapi walaupun nampak nyata perkara ini tidak membangkitkan kesangsian kepada peguam defendan ketiga untuk menyemak ketulinan transaksi ini. Dalam hal yang sedemikian, mahkamah ini mendapati defendan ketiga bukanlah boleh dikatakan sebagai pembeli bona fide dan dengan nilai ke atas tanah tersebut.

[59] Learned counsel for the third defendant had disagreed with the above.

[60] Bona fide purchaser for value as appears in s 340 of the NLC must be considered within the context of that very section. To our mind, it means that the party that seeks to be treated as such by that provision must be a party who can show that he not only has paid for the property in question, but also that he is not complicit in any manner with the commission of the impugned acts that would render the registration bad for reasons as enumerated under s 340(2) of the NLC, for instance, for forgery or fraud. In fact, even acts that are less blameworthy in degree, such as being careless or negligent could take away the subsequent purchaser from the protection afforded under the proviso.

[61] In the case of *Au Meng Nam & Anor v Ung Yak Chew & Ors* [2007] 5 MLJ 136; [2007] 4 CLJ 526, learned Justice Raus bin Sharif JCA (as he then was) after echoing Lindley MR in the case of *Oliver v Hinton* [1899] 2 Ch 264, had this to say at p 554:

> My respectful view is that a purchaser in good faith does not include a purchaser who is careless or who had been negligent.

[62] His Lordship had gone on to state that when a purchaser 'failed to take the ordinary precautions which ought to be taken in such a matter he is not entitled to the protection of the court' (see p 156 (MLJ); p 554 (CLJ) at para 44).

[63] Having said that, it now becomes incumbent on us to look at the evidence led before the leaned trial judge to see whether the third defendant/bank was entitled to the protection that the proviso seeks to afford deserving subsequent unwitting purchaser for value of an otherwise bad title.

[64] In the *Au Meng Nam & Anor* case Justice Raus Sharif JCA (as he then was) had also stressed that it was not enough to consider the fact that the full purchase price had been paid in order to determine whether the person was a bona fide purchaser. The court ought to be looking as well at the other salient circumstances surrounding the transaction before any determination on his bona fide can be concluded (see paras 41–42 at p 156 (MLJ); p 553 (CLJ)).

[65] In our present appeal, the third defendant had sought to contend that as a holder of the interest in the land by virtue of the charge created pursuant to the bridging term loan, it had stood in the position of a subsequent purchaser and that as it had disbursed the loan in full, it was a fit and roper party to be accorded the protection under the said proviso to s 340(3) of the NLC.

[66] With regard to whether the third defendant was a subsequent purchaser in this case, we are with learned counsel for the third defendant in that it was indeed such a purchaser. The evidence of the witness for the Registrar of Titles,

Selangor had shown that in point of time, the transfer of the title from the plaintiff to the first and second defendants had to happen first before the registration of the charge instrument involving the third defendant could be effected. In loose terms, it may be seen as being simultaneous, but in terms of real time, one cannot fail to see the time gap as shown by the sequence of events pertaining to the same. In the recent case of *Heveaplast Marketing Sdn Bhd v See Leong Chye @ Sze Leong Chye & 3 Others and other appeals* [2016] MLJU 835; [2016] 1 LNS 393 this court had occasion to consider on the same issue regarding a subsequent purchaser. Learned Justice David Wong JCA delivering the decision of the panel had stated thus:

> 44. Though the above dealings were on the same day and were done simultaneously on 22 April 2009, it cannot be disputed nor can we ignore the fact that the lodgement of the UOB's charge could not have been created until the first step of transfer to Heveaplast had been affected. And since there was no suggestion that UOB was tainted by fraud or forgery, UOB was what you call a purchaser for good consideration and without notice. Hence for the aforesaid reasons, we find that UOB is a subsequent purchaser and protected by the shelter of deferred indefeasibility provided for under s 340 of the NLC.
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> 45. Further, we say that the fact that Heveaplast's interest being an immediate purchaser was defeasible by the See Brothers did not, in our view, affect the indefeasibility of UOB's interest. Our view is supported by two decisions of the apex court, namely *Kamarulzaman Omar & Ors v Yakub Husin & Ors* and *Tan Ying Hong v Tan Sian San & Ors*.

[67] Having so determined that the third defendant was a subsequent purchaser, being the chargee, was it a subsequent purchaser for good consideration and without notice. In short, was it a bona fide subsequent purchaser in the circumstances of this case?

[68] From a perusal of the evidence led in the trial court, it has been established that the third defendant had left it entirely to its lawyers to do the preparation of the transfer and charge documents. There is nothing wrong in that, but the third defendant would be bound by what the lawyer does or does not do.

[69] Che Noriati Jusoh (SD4), the lawyer, testified that she did a land search but failed to produce the receipt of payment for doing the same. She then said that she did the land search on the same day that she was registering the transfer and charge documents at the land office. Later in re-examination by counsel for the third defendant, she told the court that she in fact did two land searches namely on the 30 May 2011 and on the date of registration on 28 July 2011. No official receipts were produced as evidence of the same. It is quite difficult to accept her explanation to court that she had lost the receipts. Surely as a senior partner in her legal firm, she would have kept the receipts in the client's

file for billing purposes, if not for any other ostensible reason. On top of that it was a futile exercise to do a land search on the very same day of registration of the documents of memorandum of transfer and the charge documents.

[70] A regards the *ad volarem* stamp duty which had purportedly been paid for the transaction, as evidenced by the certificate number of payment, the witness said that it was not her duty to ascertain whether it was indeed the truth of the matter. The lawyer, SD4 (Che Noriati Jusoh) had testified that it did not occur to her that the adjudication for stamping was supposed to be done by the purchasers but in this case it was done by K Kulasekar, Achan and Assoc who were purportedly acting for the vendor. The land officer said it was not her duty too to ascertain the status of the same. The land office would accept the particulars on the documents presented for registration as correct, unless there was reason to necessitate further inquiry that had put them on notice.

[71] Then there was this seemingly uncanny coincidence that existed in the letter of Messrs K Kulasekar, Achan and Assoc (at p 334 Common CB 2 exh D64) and Vib and Co dated 20 June 2011 (p 336 Common CB exh D65) in response to the letter from SD4 dated 20 June 2011. The similarities in the size of the font, design of the stamp for the word 'FAXED' and the time stamped on it, among others, pointed to a strong suspicion that these documents could have originated from the same source. Yet when asked in court, SD4 said that it did not raise any suspicion on her part.

[72] As the lawyer for the third defendant bank was the party who had submitted the documents pertaining to the registrations of the transfer and the charge to the land registry, it was her duty, first and foremost to check and verify the accuracy of the particulars contained in those documents, including the matter on the *ad volarem* stamp duty. As was led in evidence before the trial court, a simple online check with the stamps and assessment online run by the LHDN would have revealed the true status. As it turned out, the certificate number assigned was a fake number and the *ad valorem* stamp duty had not been paid at all for the transfer. Had the lawyer conducted this online check, the inevitable red flag surrounding the transaction would have been raised. The registration would have to be aborted pending further inquiry.

[73] It was also established in court that SD4 had executed the facility agreement and the charge documents on 15 June 2011 on behalf of the first and second defendant when the first and second defendant came to her office and signed the said documents. This was done despite the fact that she only received the confirmation from the vendor's solicitors K Kulasekar, Achan and Assoc on the 20 June 2011.

[74] These lapses on the part of the lawyer if taken in isolation may not be glaring, but taken as a whole and cumulatively, they would represent, to our minds a breach of the duty of care owed to her client. Indeed, some of these lapses were captured by the learned trial judge that led him to conclude that the third defendant was not a bona fide purchaser for value. The lawyer was an agent of the third defendant and what she did or omit to do would bind the latter. A failure by the lawyer is a failure of the third defendant. See the case of *Doshi v Yeoh Tiong Lay* [1975] 1 MLJ 85.

[75] Premised on the above, we are of the respectful view that the third defendant was not a bona fide purchaser for value. As such, the charge it had created over the land was therefore void and of no effect. Consequently, it should be cancelled.

[76] Following the *Au Meng Nam* case we are of the respectful view that the third defendant was not entitled to the protection of the court. We therefore would *dismiss* the appeal of the third defendant relating to the High Court order cancelling the charge over the land. The title of the plaintiff is to be returned to her in her name free of any encumbrance, minus the charge created in favour of the third defendant.

The third defendant's claim for contribution and/ or indemnity against the Registrar of Titles

[77] We now deal with the third defendant's appeal on its claim for contribution and/or indemnity from the fourth defendant. That claim for contribution against the fourth defendant was contained in para 7 of the summary of the 'third defendant's defence and claim against the fourth defendant' as follows:

> 7. The 3rd Defendant claims against the 4th Defendant to be fully indemnified for all losses suffered by the 3rd Defendant and damages which may be awarded against the 3rd Defendant, in the event the 3rd Defendant's charge over the said Land under Presentation No. 76131/2011 is declared null and void, and ordered to be cancelled from the Registry of Charges. (*Rekod rayuan No 56, Jld 1, Bahagian A, p 109.*)

[78] Although we have concluded that the third defendant is not a bona fide purchaser, it does not follow ipso facto that they are precluded from making a claim for an indemnity/contribution from the Registrar of Titles on the basis of negligence. The third defendant's lawyer's negligence is insufficient to amount to illegal, unlawful or wrongful conduct falling within maxim of *lex turpi causa non oritur action*. A perusal of the evidence on record discloses that the Registrar of Titles was indeed negligent in that:

(a) it made no attempt to notify the plaintiff of the replacement of the old title with the new title which the Registrar of Titles was statutorily required to do;

(b) it was unable to confirm the identity of the person who had collected the new title; and

(c) DW5, the Deputy Registrar of Title in his evidence conceded that the procedure adopted and the lack of records was negligent.

[79] In these circumstances, it appears to us that there was a total failure on the part of the Registrar of Titles, Selangor to comply with the procedure and regulation relating to the cancellation of the old title and issuance of the new title as required under s 90 of the NLC.

[80] It is to be noted that the learned trial judge made no finding on this issue. We therefore allow the third defendant's appeal in respect of its claim for an indemnity and/or contribution against the Registrar of Titles, Selangor. Consequently, we order that this part of the claim be remitted to the High Court for the learned judge to assess damages under this head.

CONCLUSION

[81] In the upshot, we hereby dismiss Appeal B-01(NCVC)(W)-56–02 of 2015 (by the first and second defendants) and allowed *in part* Appeal B-01(NCVC)(W)-82–03 of 2015 (by the third defendant/the bank) with costs.

[82] As a consequential order, we order the case to be remitted to the High Court of Shah Alam for the learned judge to assess the damages for the claim of full indemnity awarded to the appellant (the third defendant) against the fourth respondent (the fourth defendant).

[83] In respect of costs, for Appeal B-01(NCVC)(W)-56–02 of 2015 we order the deposit to be given to the first respondent as costs. In respect of the second respondent, we make no order as to costs.

[84] While for Appeal B-01(NCVC)(W)-82–03 of 2015, we order costs of RM7,000 to be paid by the appellant (the third defendant) to the first respondent (the plaintiff) and costs of RM30,000 to be paid by fourth respondent (the fourth defendant) to the appellant (the third defendant).

[85] All payments of costs are subject to allocatur where applicable, and we also order that the deposit for B-01(NCVC)(W)-82–03 of 2015 appeal to be refunded to the appellant bank.

Order accordingly.

Reported by Ashok Kumar